84-1112

Case No. _____

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE UNITED STATES SUPREME COURT

October 1984, TERM

In re Kenneth C. Moyer
and Lydia S. Moyer

Debtors

KENNETH C. MOYER and
LYDIA S. MOYER

Respondents

Vs.

FLEET FINANCE f/k/a
SOUTHERN DISCOUNT

Petitioner

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

The questions presented for review in this petition concern the nature, or more precisely the quantity, of exempt property in bankruptcy cases and the resulting effect of the quantity of exempt property, or a limitation thereon, upon the lien avoidance mechanism of the Bankruptcy Code.

In the case before the Court the debtors claimed an exemption under Georgia Law (OCGA 44-13-100) in certain household goods in which a security interest was held by the creditor. The exemption statute utilized by the debtors and enacted by the Georgia Legislature tracks in pertinent part the language of the Bankruptcy Code, and allows an exemption of "the debtor's interest" in certain personal property, including the type of property in which the creditor holds a security interest in this case. Based on the claimed exemption, the debtors sought to avoid the creditor's lien under 11 U.S.C. Section 522(f) on the theory that the lien impaired the exercise of their full exemption. The

creditor contends that its lien is not an impairment of the debtors' exemption because the debtors could only exempt their "interest" in the property and not that of the creditor, and therefore 11 U.S.C. Section 522(f) is not available.

Thus, this petition brings squarely into question the meaning of the phrase "debtors interest" as found in both the Federal and Georgia Homestead Statutes.

PARTIES TO THE PROCEEDING

Pursuant to Rule 21.1(b) Petitioner hereby certifies that the following listed parties may have an interest in the outcome of this case:

Kenneth C. Moyer and Lydia S. Moyer, Respondents

Fleet Finance, f/k/a Southern Discount, Petitioner

Fleet Finance Group, Inc. - Parent Company

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OF COURTS BELOW

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BEST AV

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed by this Petition was dated and entered in the Court below on October 12, 1984. No Petition for Rehearing was filed and no extension of time was requested or granted for the filing of this Petition.

The statutory provision believed to confer jurisdiction in this Court to review the judgment or decree in question is 28 U.S.C. Section 1254(1).

AILABLE COPY

STATUTORY PROVISIONS INVOLVED IN THE CASE

I. 11 U.S.C. Section 522(d) which is pentinent part provides:

(d) The following property may be exempted under subsection (b)(1) of this section:

(3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

II. 11 U.S.C. Section 522(f), which provides in pertinent part:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

****

(2) a nonpossessory, nonpurchase-money security interest in any --

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;... ****

A complete copy of 11 U.S.C. Section 522 is included in the Apendix.

III. OCGA 44-13-100, which provides in pertinent part:

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(4) The debtor's interest, not to exceed $200.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

The exemption of the debtor's interest in the items contained in this paragraph shall not exceed $3,500.00 in total value;

A complete copy of OCGA 44-13-100 is included in the Appendix.

> may exempt, pursuant to this Article, for purposes of bankruptcy, the following property:
>
> "(4) The debtor's interest, not to exceed $200.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this paragraph shall not exceed $3,500.00 in total value;" (emphasis supplied)

It is the meaning of the phrase "debtor's interest" in subsection (4) above set out which is in question in this case. However, because of the duplication of the above language in the Federal and Georgia exemption statutes, not only is the Georgia exemption statute in question, the Federal statute is itself at issue. Furthermore, the lower courts rulings

STATEMENT OF THE CASE

I. REVIEW OF FACTS MATERIAL TO THE CASE:

On May 25, 1982, Kenneth C. Moyer and Lydia S. Moyer entered into a loan tranaction with Southern Discount Company (now Fleet Finance, Inc.) wherein the Moyers borrowed $2510.40 from Fleet and granted Fleet a security interest under Georgia's Uniform Commercial Code in certain of their household goods and furnishings in order to secure repayment of the debt. The security interest granted to Fleet was of the nonpossessory, nonpurchase-money type customarily found in small loan transactions.

The Moyers failed to pay according to the loan terms and ultimately on December 30, 1983, filed a joint petition in the United States Bankruptcy Court, Northern District of Georgia, (case No. 83-05715) seeking relief under Chapter 7 of the Bankruptcy Code. An order for the requested relief was thereupon entered. In their petition the Moyers claimed an exemption in the household goods which secured Fleet's loan.

On January 11, 1984, the Moyers filed a Motion pursuant to 11 U.S.C. Section 522(f) to avoid the lien held by Fleet on their household goods and furnishings contending, inter alia, that Fleet's lien impaired an exemption to which they were entitled. Fleet filed a timely response thereto denying that the Moyers were entitled to avoid the lien since they possessed no equity in the personal property and therefore had no homestead claim therein. On May 17, 1984, after a hearing the Bankruptcy Court entered its Order avoiding the lien held by Fleet pursuant to 11 U.S.C. Section 522(f). In re Moyer, 39 B.R. 211 (1984).

On May 25, 1984, pursuant to the written consent of the parties, Fleet appealed the Bankruptcy Court's holding directly to the United States Court of Appeals for the Eleventh Circuit. On October 12, 1984, the Eleventh Circuit entered its opinion and judgment affirming the Bankruptcy Court's holding which avoided Fleet's lien on the Moyers' household goods and furnishings.

This petition presents the question of whether or not the lower Court's judgment avoiding

Fleet's lien was, as a matter of law, proper.

II. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States Bankruptcy Court for the Northern District of Georgia, Atlanta, Division, the Court of first instance, obtained jurisdiction pursuant to 28 U.S.C. Section 1471. By agreement of the parties, the United States Court of Appeals for the Eleventh Circuit obtained jurisdiction pursuant to 28 U.S.C. Section 1293(b).

ARGUMENT

This case raises the important question of the meaning of a phrase which has its genesis in the Bankruptcy Code.

The enactment of the 1978 Bankruptcy Code brought about sweeping changes in the administration of bankruptcy estates, one such change being the area of exemptions allowed to a bankrupt debtor. The new Bankruptcy Code took a significant departure from the then present law by establishing new federal exemptions to be utilized by bankruptcy debtors in cases where states had not exercised the right granted them to opt-out of the federal exemption scheme. 11 U.S.C. Section 522.

Pursuant to the authority granted in 11 U.S.C. Section 522(b)(1), in 1980 the State of Georgia exercised

the right granted to opt-out of the federally created bankruptcy exemptions in favor of temporary state exemptions to be utilized by insolvent debtors until July 1, 1981. Georgia Laws 1980, pp. 952. et seq. In 1981 the State of Georgia again enacted its own version of bankruptcy exemptions to be used by insolvent debtors. Georgia Laws 1981, pp. 626 et seq. The 1981 legislation has now been officially codified and is found in OCGA 44-13-100. The material portions of both the 1980 and the 1981 Georgia exemption provisions track (except dollar amount) the federal bankruptcy exemption provisions which are found in 11 U.S.C. Section 522)d). Indeed, the Georgia exemption provisions in question in this case represent a verbatim reproduction of the Federal exemption statute, (except for the dollar limitation found in the Georgia exemption). Based on this similarity of language, at least one Court has concluded

that the meaning of the phrase "debtor's interest" in the Georgia exemption statute which is under consideration in this case must be construed in accordance with the identical provision found in 11 U.S.C. Section 522(d) from which the Georgia legislature so clearly obtained its verbage. In re Maddox, 713 F.2d 1526 (11th Cir., 1983).

Mr. & Mrs. Moyer, the debtors in this case, claimed an exemption pursuant to Georgia's homestead exemption statute in certain household goods and furnishings in which Fleet held a valid security interest pursuant to the Georgia Uniform Commercial Code. The specific provision of Georgia's homestead statute upon which the debtors based their homestead claim provides:

> "44-13-100 Applicability of article to intestate insolvent estates.
>
> "(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person

with respect to the meaning of the phrase is inconsistent with a decisions of this Court, the Sixth Circuit and the Court of Appeals of Georgia.

Petitioner argued in the Courts below that the phrase "debtor's interest" in Georgia's Homestead Statute[1] did not encompass all of the rights to the property, but only those rights owned or possessed by a debtor. Thus, the rights of a debtor in property would not include any consensual liens which the debtor granted in specific property since those rights were no longer owned and controlled by a debtor.

The word "interest" signifies a right in the nature of property, but less than the whole.[2] cf.

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[1] Because Georgia has exercised its right to opt-out of the federal exemption scheme, the determination of what property interest of the debtor is exempt is a matter of State, not Federal, law. First Nat. Bank of Mobile v. Norris, 701 F.2d 902 (11th Cir., 1983); In re LaFortune, 652 F.2d 842 (9th Cir., 1981).

[2] Black's Law Dictionary, 5th Ed. 1979. "The Most general term that can be employed to denote a right, claim, title or legal share in something. In its application to lands or things real it is frequently used in connection with the terms 'estate', 'right' and 'title'. More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title."

Byrd v. Goodman, 195 Ga. 621, 25 S.E. 2d. 34 at 41 (1943).

It is clear that various "interests" make up the whole property, such interests being as diverse as there are claims to property. The right of possession is itself an interest in property, including a lender's contingent right of possession under a security agreement. This matter has been recently touched upon by this Court in the case of United States v. Security Industrial Bank, 459 U.S. 70, 103 S. Ct. 407. 74 L. Ed 235 (1982), wherein the United States argued that a non-purchase-money, non-possessory interest in personal property was not a substantial interest in property.[3]

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[3] The United States apparently conceded that the creditor did have some rights, but argued that the rights were so "insubstantial" as to not warrant Constitutional protection. The Government conceded that the liens were "property" under state law. 103 S. Ct. at P. 411, and fn. 6.

In response to the Government's argument, this Court stated:

> "The 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property. And our decisions in Radford, supra, and Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed 2d 1554 (1961), militate against such a proposition." 103 S. Ct. at p. 411 (footnote omitted).

A more comprehensive reading of the Security Industrial Bank case, supra, refutes any argument that a secured party does not have a property interest in collateral which secures the loan. This being

so then it necessarily follows that the rights of the debtor in the whole of the property are reduced according to the quantity of the estate ("interest") he has granted to his creditor.[4] In most cases, as in this case,[5] the rights granted by the debtor to creditor are the right to take possession upon default and sell the collateral at public or private sale for the purpose of paying the debt. The remaining interests in the collateral, such as the right of possession and enjoyment, are retained by the debtor. Nevertheless, both creditor and debtor alike have separate and distinct

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[4] The Georgia Uniform Commercial Code O.C.G.A. 11-1-201(37) defines "security interest" as "(a)n interest in personal property or fixtures which secures payment or performance of an obligation...."

[5] The loan contract and security agreement in this case are not in the record. However, the Agreement provides:
"Upon default and acceleration, the Lender shall have the remedies of a secured party under the Uniform Commercial Code of Georgia, including the right to take immediate possession of the property by private action."

legal or equitable interests in the same property, neither of which conflict with the other's interest.

If the word "interest" signifies a right in property less than the whole, then both of the Georgia legislature and Congress by using the phrase "debtor's interest" in defining exempt property must have intended to allow an exemption only in those rights in the property which belonged to the person claiming the benefit of the homestead exemption. It is absurd to think that a debtor could exempt rights in property belonging to someone other than the debtor, and the exercise of any such rights to the extent that they deprive another of his rights in the same property surely constitute a taking of property in violation of the Constitution.

The quantity of property which is exempt under Georgia's homestead statutes (and by induction the

Federal homestead provisions) has been addressed in three important cases. The first case was In re Maddox, 713 F. 2d 1526 (11th Cir. 1983). In Maddox, the Eleventh Circuit refused to hold that the term "debtor's interest" means "equity" and thus abdicated the lender's interest, saying:

> "This Court must reject the appellant's narrow interpretation of the phrase 'debtor's interest.' The word 'interest' is a broad term encompassing many rights of a party, tangible, intangible, legal and equitable, and the Court will not redefine the term to reach the result sought by the appellant."
> 713 F. 2d at p. 1530.

The net effect of the Maddox ruling is that the term "debtor's interest" includes all of the interest in the property including any interest held by a creditor claiming a security interest in the property. This conclusion, although incorrect, is the net effect of the Maddox Court's holding because the Court refused to

recognize that the creditor had any interest in the property which was independent of and which coexisted with that of the debtor. In short, there was no distinction made between debtor's and creditor's interest in the same property.

Shortly prior to the time the opinion in Maddox, supra, was rendered by the Eleventh Circuit, the Georgia Court of Appeals in Wallis v. Clerk, Superior Court of DeKalb County, 166 Ga. App. 775, 305 SE 2d 639 (1983), addressed the meaning of the phrase "debtor's aggregate interest" with reference to exemptions in real estate found in Georgia's homestead statute. However, the Maddox Court never directly addressed the issues decided by the Georgia Court of Appeals in Wallis, supra.

In Wallis, supra, the Georgia Court of Appeals was called upon to determine the meaning of the phrase "debtor's aggregate interest" found in OCGA

Section 44-13-100(a). There the Court stated:

> "A Bankrupt is entitled to claim a homestead exemption only from his 'aggregate interest' in real property. OCGA Section 44-13-100(a) (Code Ann. Section 51-1301.1). This means that 'only the unencumbered portion of the property is to be counted in computing the 'value of the property for the purposes of determining the exemption.' 9 Am. Jr. 2d 526, Bankruptcy Section 315. Appellant had no aggregate interest in the property against which to assert his claimed homestead exemption." 305 S.E. 2d at P. 641.

Although Wallis, supra, dealt with a slightly different phrase from that now under consideration (i.e. "debtor's interest" vs. "debtor's aggregate interest"), the distinctions are ever so slight, and it would seem that there is merely a distinction without a difference.

Georgia's interpretation of the provision of its homestead statute defining the quantity of an estate

which may be set aside as a homestead statute is consistent with the analysis proffered by petitioner herein. That is, "debtor's interest" includes only that portion of the estate retained by the debtor, after all conveyances of lesser estates by him and it does not include the estate held by a lienholder, which is itself an "interest" in the property.

Another Circuit Court of Appeals has also addressed the meaning of the phrase "debtor's interest" found in Georgia's Homestead Statute. In In Re Pine; In re Giles vs. Credithrift of America, Inc., 717 F. 2d 281 (6th Cir. 1983), the 6th Circuit stated with regard to the Georgia and the Tennessee homestead statutes:

> "The two legislatures have specifically declined the exempt household goods to the extent that they are encumbered by a lien. The Georgia statute refers only to the 'debtor's interest' in property and the Tennessee statute referes

> to the 'debtor's equity interest' when delineating the exempt property. Rather than simply listing the type of possessions that are exempt (e.g., the debtor's car) without regard to legal interests or specifying generally that the 'debtor's property' is exempt, these two states have said that only the debtor's legal interest is exempt. In other words, the debtor may exempt only that interest in property which is owned by him and unencumbered by third party liens." (emphasis added) 717 F. 2d at p. 283.

The Sixth Circuit has accepted the same proposition which the Eleventh Circuit has rejected with respect to Georgia's Homestead provisons.

The same phrase ("debtor's interest") appears in other subparts of OCGA 44-13-100. For instance in subsection (a)(3) the Statute provides:

> "The debtor's interest, not to exceed the total of $1000.00 in value, in all motor vehicles;" (emphasis added)

One would hardly suggest that this same language ("debtor's interest") would allow the debtor to contend that he could exempt a vehicle to the exclusion of the lien. It is readily apparent that the phrase there used means equity, and it is difficult to preceive that the language could carry two entirely different meanings within the same statute. Indeed, since the same phrase, or essentially the same phrase, appears seven times in the Georgia Homestead Statute[6] it would be absurd to suggest that it might carry with it seven different meanings, dependent only on the type of property being exempted. The logical and reasonable conclusion is that the phrase "debtor's interest" means the debtor's rights in the property, less and except any outstanding claims or rights held by other persons.

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6 OCGA 44-13-100(a)(1)(5)(6)(7) and (9) use the language "debtor's aggregate interest" in defining what property is exempt. Subsections (a)(3) and (4) use "debtor's interest."

An analogy can be drawn from the Federal and Georgia exemption provision relating to real property. In Georgia the provision is contained in OCGA 44-13-100(a)(1), which reads:

> "The debtor's aggregage interest, not to exceed $5,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor;" (emphasis supplied)

In that Section the language is the "debtor's aggregate interest" which is only a slight and apparently meaningless deviation from the phrase "Debtor's interest" as found in the sections relating to household goods and other items of property. This is the same language (except for dollar amount) employed by Congress in defining real property exemptable by a debtor having the right to use the federal exemptions of 11 U.S.C. Section 522(d)(1).

The phrase "debtor's aggregate interest" as

used in 11 U.S.C. Section 522(d)(1) was considered by the House of Representatives to mean only the debtor's equity. H.R. Rep. No. 95-598, 95th Cong., 2d Sess. 360-61 (Sept. 8, 1977, reprinted in (1978) U. S. Code, Cong. & Adm. News 5963, 6316, reads:

> " Under proposed 11 U.S.C. 541, all property of the debtor becomes property of the estate, but the debtor is permitted to exempt certain property from property of the estate under this section. Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the 'value' of the property for the purposes of exemption. Thus, for example, a residence worth $30,000 with a mortgage of $25,000 will be exemptable to the extent of $5,000. This follows current law. The remaining value of the property will be dealt with in the bankruptcy case as is any interest in property that is subject to a lien." (emphasis added).

In light of this report, it can hardly be argued that "debtor's aggregate interest" means anything other than the quantity of the property interest owned by the

debtor and it certainly does not include interests owned by others, such as mortgage holders. Likewise the phrase "debtor's interest" as it is used in OCGA 44-13-100(a) means only the quantity of property owned by the debtor and it excludes any interest in the property owned by any other person. Since consensual liens or security interests under the Uniform Commercial Code fall within the definition of an interest in property and they are owned by persons other than the debtor, they are not included in the definition of "debtor's interest" either under federal or state law, and such interests (security interests) are not a part of the exemptable property granted to a debtor under either statute. The debtor's exemption can include only that portion of the rights to property retained by him and not those rights conveyed to other persons.

In the case now before this Court, the Eleventh Circuit rejected Petitioner's interpretation of the phrase under consideration, stating

> "The previous decision of this Court in In re Maddox, 713 F. 2d 1526 (11th Cir. 1983, is precisely on point and controls the disposition of this appeal. In re Maddox established a definition of the phrase 'debtor's interest' that encompasses 'many rights of a party, tangible, intangible, legal and equitable.' Id at 1530. The meaning of this phrase is not limited to debtor's equity."

The effect of the Eleventh Circuit's holding is to deny the existence of any interest of a creditor holding a lien on property claimed exempt by a debtor. This conclusion is wholly inconsistent with the rationale of the 6th Circuit case of In re Pine, supra, and the decision of this Court in United States v. Security Industrial Bank, supra. Furthermore, said holding is dramatically in conflict with the holding in the Wallis case, supra, which is a decision of a Court of last resort in Georgia. Because the language brought into question in the this case exists in the Federal and State exemptions, the holding will have far reaching effect, and it is not limited merely to bankrupts whose

exemptions are controlled by Georgia law.

Having characterized that quantity of property which is exemptable under Georgia law, it is next necessary to address the lien avoidance provisions to ascertain what effect, if any, it may properly have upon property not exemptable by a debtor. Since the debtor may exempt only his "interest", all other interests in the same property are by definition non-exempt.

The relevant portion of 11 U.S.C. Section 522(f) to be considered reads as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -
>
> "(2) a nonpossessory, nonpurchase-money security interest in any -
>
> "(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the

personal, family, or household use of the debtor or a dependent of the debtor;" (emphasis added)

It is important to note that the lien avoidance mechanism of Section 522(f) operates to avoid a lien on (a)n interest of the debtor...." As demonstrated hereinbefore, the creditor's lien is not an interest of the debtor, but is a separate interest in and of itself, existing independently of any interest of the debtor. More importantly, under the lien avoidance provision, the lien must impair an exemption of the debtor or to which the debtor would have been entitled. It is apparent that the lien avodience provision does not generate an additional exemption, but by its very own language is dependent upon the debtor's right to an exemption under either Federal or State laws.

The correctness of petitioner's view is ably demonstrated by the case of Matter of McManus, 681 F. 2d 353 (5th Cir. 1982). In holding a Louisiana exemption statute valid, the Fifth Circuit stated:

"Significantly, the avoidance

> provisions of Section 522(f) are available to debtors seeking to avoid a lien only 'to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)' of section 522. In other words, this federal avoidance section is not a separate exemption statute. It provides only a limited mechanism for avoiding liens, since the only liens that may be avoided are those impairing an exemption the debtor would have been entitled to receive under Section 522(b). Since the invocation of Section 522(f) is dependent upon whether a debtor may be legally entitled to an exemption under Section 522(b), the second step in resolving the controversy is an examination of Section 522(b)." 681 F. 2d at p. 355.

A reading of McManus, supra, demonstrates the correctness of petitioner's position that 11 U.S.C. Section 522(f) creates no new exemption, but provides only a method of the full exercise of an exemption previously granted. Thus, if no exemption is allowed under applicable State or Federal Law the lien avoidance action can create none.

The McManus Court also made it clear that the state's limitation of exemptions allowed to a debtor

is not a violation of the Federal Supremacy Clause.

There the Court said:

> "The debtors argue that 11 U.S.C.A Section 522(f) is intended to give debtors a 'fresh start' by allowing them to avoid liens that may have been improvidently granted to creditors. They contend that the rehabilitive policy of Section 522(f)'s avoidance mechanisms is a policy that overrides any individual state policies, and a state cannot control, either directly or indirectly, the content of the policy of Section 522(f).
>
> "As previously noted, however, Section 522(f) is not a separate exemption statute. It gives effect to the state's choice of exemptions, and is dependent upon the states for the definition of what liens may be avoided. Section 522(f) is not available if any individual state says a debtor is not entitled to a particular exemption. As the District Court in McManus stated, 'It just strikes (this Court) that it is a conclusion that is inescapable that Congress must have realized that the states may enact defferent exemptions which would possibly conflict with Congress' own exemption policy as it was reflected in Section 522(d). If Congress has (sic) intended subsection (f) to be an overriding policy decision, it would not have

> made subsection (f) clearly dependent on the policy determinations by the states under Section 522(b)". 681 F.2d at p. 357, fn. 7.

The issue of preemption has also been considered by the 7th Circuit. In the case of Matter of Sullivan, 680 F. 2d 1131, (7th Cir. 1982) the Court stated:

> "The statute's treatment of exemptions reflects at the very least a mixed intention on the part of Congress. Second, and more significant, the Rhodes court is applying a preemption analysis to a situation in which Congress has specifically directed that a State can choose to declare section 522(d) inapplicable to its citizens. To apply a preemption analysis in this context is to ignore totally the explicit language of the section 522(b)(1) opt-out provision." 680 F. 2d at p. 1136.

It cannot be gainsaid that Congress by adoption of Section 11 U.S.C. Section 522(b)(1) did not intend to permit a State to decide what, if any, property a State might wish its citizens to enjoy through exemption. It necessarily follows that a State could, by

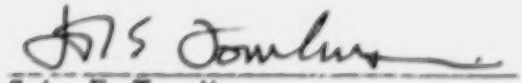
simply failing to provide an appropriate exemption, fully defeat the operative effect of the lien avoidance provision of 11 U.S.C. Section 522(f). Had the Georgia legislature failed to grant any exemption to a debtor for household goods and furnishings, such action would entirely frustrate the effect of Section 522(f); yet it would clearly fall within that grant of authority given failure of a State to grant an exemption in the property interests previously conveyed to another is not violative of any provision of the Federal Constitution, but is in keeping with the State's right under 11 U.S.C. Section 522(b)(1) to determine what property shall be exempt.

Since the creditor's interest does not impair the full execise of a debtor's exemption in household goods, Section 522(f) is not available to defeat the creditor's lien.

Because of the importance of this case this Court should take juridsiction of the matter and define the language at issue consistent with the rights of creditors, and decide once and for all time whether a

creditor's rights in property may be summarily dismissed as passing with a debtor's exemption claim.

Respectfully submitted,



John E. Tomlinson
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8435
NON-ARGUMENT CALENDAR

IN RE: KENNETH C. MOYER and
LYDIA S. MOYER,

Debtors,

KENNETH C. MOYER and
LYDIA S. MOYER,

Plaintiffs-Appellees,

versus

FLEET FINANCE a/k/a
SOUTHERN DISCOUNT,

Defendant-Appellant.

Appeal from the United States District
Court for the Northern District
of Georgia

(October 12, 1984)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Fleet Finance appeals directly to this Court from an order issued by the United States Bankruptcy Court for the Northern District of Georgia 39. B.R. 211,

which held that the phrase "debtor's interest," appearing in O.C.G.A. Section 44-13-100(a)(4), is not limited in meaning to the debtor's equity over and above liens held by creditors in certain types of property owned by the debtor: household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments held primarily for personal, family, or household use.

The previous decision of this Court in In re Maddox, 713 F.2d 1526(11th Cir. 1983), is precisely on point and controls the disposition of this appeal. In re Maddox established a definition of the phrase "debtor's interest" that encompasses "many rights of a party, tangible, intangible, legal and equitable." Id. at 1530. The meaning of this phrase is not limited to debtor's equity.

We AFFIRM the order of the bankruptcy court.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NUMBER
	:	
KENNETH C. MOYER	:	83-05715A
LYDIA S. MOYER,	:	
	:	In Proceedings
Debtors	:	Under Chapter
	:	7 Of The
	:	Bankruptcy Code
KENNETH C. MOYER	:	
LYDIA S. MOYER	:	
	:	Contested Matter
Movants	:	
	:	
FLEET FINANCE	:	
f/k/a SOUTHERN DISCOUNT,	:	
	:	
Respondent	:	
	:	ORDER

On January 11, 1984, the debtors, Kenneth C. and Lydia S. Moyer, filed motion pursuant to Bankruptcy Code Section 522(f)(2) to avoid a nonpossessory, nonpurchase-money security interest in the debtors' household goods. The lienholder, Fleet Finance, Inc. ("Fleet Finance"), filed its response on January 23, 1984. Following a hearing on March 6, 1984, this matter was taken under advisement.

The parties have stipulated to the material facts: The debtors filed for relief under Chapter 7 of the Bankruptcy Code on December 30, 1983, at which time they were indebted to Fleet Finance in the amount of $3,248.00. Fleet Finance's claim of $3,248.00 is secured by a nonpossessory, nonpurchase money security interest in the debtors' household goods. The value of the encumbered household goods is $1,000.00.

Section 522(f) provides in relevant part:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
>
> (2) a nonpossessory, nonpurchase-money security interest in any --
>
> (A) household furnishings, household goods . . . appliances . . .;

According to the parties in the instant proceeding, the availability of the lien avoidance mechanism of Bankruptcy Code Section 522(f) turns on an interpretation of the Georgia exemption statute.

Bankruptcy Code Section 522(b)(1) enables a state to opt out of the federal exempton scheme set forth in Bankruptcy Code Section 522(d). Upon the enactment of O.C.G.A. Section 44-13-100(b), the Georgia legislature has so elected to prohibit an individual debtor whose domicile is in Georgia from applying or utilizing the federal exemptions found in Section 522(d) of the Bankrutpcy Code. Accordingly, the debtors in the case sub judice may not avail themselves of the exemption stated in Section 522(d)(3) of the Bankruptcy Code. However, a parallel exemption was provided by the Georgia legislature in O.C.G.A. Section 44-13-100(a)(4).

O.C.G.A. Section 44-13-100(a)(4) states as follows:

> (a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this Article, for purposes of bankruptcy the following property:
>
> . . .
>
> (The debtor's interest, not to exceed $200.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or

> household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this paragraph shall not exceed $3,500.00 in total value;

The question before the Court is whether the term "debtor's interest" means that the exemption under Georgia law is available only to the extent that the debtor has equity in the subject household goods, etc.

The precise question before the Court was answered by the Eleventh Circuit Court of Appeals in the case of In re Maddox, 713 F.2d 1526 (11th Cir. 1983), wherein the Court affirmed the holding of the District Court that the state law exemptions protected by Section 522(f) are not limited to the equity owned by the debtor in the property. Fleet Finance argues that Maddox is no longer controlling given a recent interpretation of the homestead exemption provision in O.C.G.A. Section 44-13-100(a)(1) by the Georgia Court of Appeals in the case of Wallis v. Clerk, Superior Court of DeKalb County, 166 Ga. App. 775 (Ga. Ct. App. 1983).

In Wallis, the Georgia Court of Appeals stated as follows:

> A bankrupt is entitled to claim a homestead exemption only from his "aggregate interest" in real property. OCGA Section 44-13-100(a) (Code Ann. Section 51-1301.1). This means that "only the unencumbered portion of the property is to be counted in computing the 'value' of the property for purposes of determining the exemption." 9 Am. Jur. 2d 526, Bankruptcy Section 315. Appellant had no aggregate interest in the property against which to assert his claimed homestead exemption.

Wallis v Clerk, Superior Court of DeKalb County, 166 Ga. App. at 776. The Court finds at least two reasons for concluding that Wallis does not undermine the decision by the Eleventh Circuit Court of Appeals in Maddox.

First, Wallis interpreted the Georgia homestead exemption, which was not at issue in Maddox. Therefore, any difference between Wallis and Maddox may be attributable to the distinct policy considerations underlying the two different exemptions discussed therein. Second, the homestead exemption makes reference to the "debtor's aggregate interest" in property, whereas the limited exemption in household goods refers to the "debtor's interest". Although the difference in wording is slight, when considered in light

of the rationale behind the exemption in which the selected language is used, the difference must be regarded as significant.

The Georgia Court of Appeals in Wallis logically concluded that, in applying the $5,000.00 homestead exemption, the "debtor's aggregate interest" should mean the debtor's equity. To have concluded otherwise would mean that a debtor could use the $5,000.00 homestead exemption to diminish a lienholder's recourse against the homestead to the extent of $5,000.00. Such a result would be clearly detrimental to the lienholder and might adversely impact upon the availability of credit from mortgage lenders.

Conversely, the lien avoidance provision of Section 522(f) of the Bankruptcy Code, which is compatible with the exemption found in Section 522(d)(3) of the Bankruptcy Code and the parallel state exemptions for household goods, etc., does not have such a directly adverse effect upon a lienholder's interest. Congress contemplated that the value of collateral upon which a lien would be avoided under Section 522(f) would be nominal to the creditor relative to the potentially

devastating effect of repossession of the collateral upon the individual debtor and his dependents. The legislative history to Bankruptcy Code Section 522(f), quoted in Maddox, states as follows:

> (T)he bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any nonpurchase-money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankrutpcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all the debtor's household goods as means of

obtaining payment.

> In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement costs of the goods are generally high. Thus, creditors rarely repossess, and debtors, ignorant of the creditors' true intentions, are forced into payments they simply cannot afford to make.
>
> The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase-money security interest in household goods.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 127 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, pp.5787, 6087-8.

Fleet Finance also relies upon the opinion by the Sixth Circuit Court of Appeals in In re Pine, 717 F.2d 281 (6th Cir. 1983), to support its position that the phrase "debtor's interest" in O.C.G.A. Section 44-13-100(a)(4) refers to the debtor's equity in the property. The Court

in Pine concluded that both Tennessee and Georgia exemption statutes preclude lien avoidance under Section 522(f) of the Bankruptcy Code. Therefore, creditors in two Chapter 7 cases were permitted to retain nonpossessory, nonpurchase-money security interests in the debtors' household goods. This Court is not persuaded by the logic of Pine.

First, Pine is not binding upon this Court. To the extent that Maddox is contrary to Pine, this Court must follow Maddox. Second, the debtors' brief accurately points out several deficiencies in the rationale of Pine. No further elaboration on Pine is necessary, however, because Maddox is the controlling precedent in this Circuit.

On the basis of the foregoing, the debtors' motion to avoid a nonpossessory, nonpurchase-money secuirty interest shall be and is herey GRANTED.

IT IS SO ORDERED.

At Atlanta, Georgia, this 16 day of May, 1984.

/s/
W. Homer Drake
United States
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8335
Non-Argument Calendar

Bankruptcy Docket No. 83-05715

IN RE: KENNETH C. MOYER and
LYDIA S. MOYER,

Debtors,

KENNETH C. MOYER and
LYDIA S. MOYER,

Plaintiffs-Appellees,

versus

FLEET FINANCE a/k/a
SOUTHERN DISCOUNT,

Defendant-Appellant.

Appeal from the United States
Bankruptcy Court for the
Northern District of
Georgia

Before RONEY, FAY and JOHNSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States

Bankruptcy Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Bankruptcy Court appealed from, in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of ths Court.

Entered: October 12, 1984

For the Court:

Spencer D. Mercer,
Clerk,

By: /s/
Deputy Clark

ISSUED AS MANDATE: Nov 6, 1984

11 Section 522

Section 522. Exemptions

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2) (A) any property that is exempt under Federal law, other than subsection (d) of this section or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other

place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for the debt of the debtor that arose, or that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, except--

(1) a debt of a kind specified in section 523(a)(1) or section 523(a)(5) of this title; or

(2) a lien that is--

(A) not avoided under section 544, 545, 547, 548, 549 or 724(a) of this title:

(B) not voided under section 506(d) of this title; or

(C)(i) a tax lien, notice of which is properly filed; and (ii) avoided under section 545(2) of this title.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a defendant of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to

exceed in value $400 plus any unused amount of the exemption proivded under paragraph (1) of this subsection, in any property.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accured dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A) a social security benefit,

unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of

the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(II) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual precuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of

future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(e) A waiver of exemptions executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any--

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instrument, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

(g) Notwithstanding section 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such

transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this tittle (sic); and

(2) the trustee does not attempt to avoid such transfer.

(i) (1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under section (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this

section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of his (sic) section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsection (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administative expenses except--

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of

recovery of property under subsection (i) (l) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) This section shall apply separately with respect to each debtor in a joint case.

44-13-100. Applicability of article to intestate insolvent estates.

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(1) The debtor's aggregate interest, not to exceed $5,000.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor;

(2) The debtor's right to receive:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit;

(B) A veteran's benefit;

(C) A disability, illness, or unemployment benefit;

(D) Alimony, support, or separate

maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) A payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(3) The debtor's interest, not to exceed the total of $1,000.00 in value, in all motor vehicles;

(4) The debtor's interest, not to exceed $200.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this paragrpah shall not exceed $3,500.00 in total value;

(5) The debtor's aggregate interest, not to exceed $500.00 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(6) The debtor's aggregate interest, not to exceed $400.00 in value plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property;

(7) The debtor's aggregate interest, not to exceed $500.00 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor;

(8) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract;

(9) The debtor's aggregate interest, not to exceed $2,000.00 in value, less any amount of property of the estate transferred in the manner specified in Section 542(d) of U.S. Code Title 11, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent;

(10) Professionally prescribed health aids for the debtor or a dependent of the debtor; and

(11) The debtor's right to receive, or property that

is traceable to:

(A) an award under a crime victim's reparation law;

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individuals, death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) A payment, not to exceed $7,500.00 on account of personal bodily injury, not including pain and suffering or compensation for actual precuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and

any dependent of the debtor.

(b) Pursuant to 11 U.S.C. Section 522(b)(1), an individual debtor whose domicile is in Georgia is prohibited from applying or utilizing 11 U.S.C. Section 522(d) in connection with exempting property from his or her estate; and such individual debtor may exempt from property of his or her estate only such property as may be exempted from the estate pursuant to 11 U.S.C. Section 522(b)(2)(A) and (B). For the purposes of this subsection, an "individual debtor whose domicile in Georgia" means an individual whose domicile has been located in Georgia for the 180 days immediately preceding the date of the filing of the bankruptcy petition or for a longer portion of such 180 day period than in any other place.

(c) The exemptions and protections contained in this article are extended to intestate insolvent estates in all cases where there is a living widow or child of the intestate. (Ga. L. 1865-66, p. 29, Section 1; Code 1868, Section 2022; Code 1873, Section 2049; Code 1882; Section 2049; Civil Code 1895, Section 2875; Civil Code 1910, Section 3425; Code 1933, Section 51-1504; Code 1933, Section 51-1301.1, enacted by Ga. L. 1980, p. 952, Section

2; Code 1933, Section 51-1601, enacted by Ga. L. 1980, p. 952, Section 3; Ga. L. 1981, p. 626, Sections 2,3.)

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the Petition for Writ of Certiorari in the foregoing matter to opposing counsel by depositing three copies of same in the United States Mail in a properly addressed envelope with adequate postage thereon and addressed to:

Paul C. Parker
Attorney at Law
212 Church Street
Decatur, GA 30030

Rose H. Staples
Attorney at Law
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January 8, 1985

John E. Tomlinson
Attorney for
Petitioner

84-1112

Office Supreme Court, U.S.
FILED
MAR 28 1985
ALEXANDER L. STEVAS,
CLERK

Case No. _____

IN THE UNITED STATES SUPREME COURT

October 1984, TERM

In re Kenneth C. Moyer
and Lydia S. Moyer

Debtors

KENNETH C. MOYER and
LYDIA S. MOYER

Respondents

Vs.

FLEET FINANCE f/k/a
SOUTHERN DISCOUNT

Petitioner

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES

Whether, pursuant to 11 U.S.C. §522(f) and Official Code of Georgia Ann. §44-13-100(a)(4), a debtor in bankruptcy may avoid a lien based on a nonpossessory, nonpurchase money security interest in household goods and furniture in cases where the value of said property is less than the amount of the debt secured by such lien.

Specifically, is the term "debtor's interest" in the household goods exemption strictly limited to mean only the "debtor's legal interest" in property (i.e., only the debtor's equity in property); or is the term inclusive of all the debtor's various interests in property as defined by 11 U.S.C. §541?

The glaring error in Petitioner's Statement is that it asserts the question before the Court relates to the homestead exemption. It does not. There is no real estate involved in this case. Furthermore, the debtors did not claim a homestead exemption in this case.

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SUMMARY OF THE ARGUMENT

A debtor in bankruptcy can avoid a lien based on a nonpossessory, nonpurchase money security interest in household goods and furniture. 11 U.S.C. §522(f); Official Code of Georgia Ann. §44-13-100(a)(4). Where a lien is based on a nonpossessory, nonpurchase money security interest in household goods and furniture, the debtor may create equity in the property by avoiding said lien. That is the meaning of the pertinent Georgia and Federal statutes; and that is the clear intent of Congress. If under Georgia law "debtor's interest" in the household goods exemption means only the debtor's legal interest, i.e., only the debtor's equity, the Georgia statute would violate the Supremacy Clause of the United States Constitution because such an interpretation would render the Federal statute meaningless.

ARGUMENT AND AUTHORITIES

DEBTOR MAY AVOID NONPOSSESSORY, NONPURCHASE MONEY LIEN ON HOUSEHOLD GOODS WORTH LESS THAN AMOUNT OF DEBT

Petitioner claims a nonpossessory, nonpurchase money security interest in certain of debtors' household goods and furniture. The value of the subject property is less than the amount of the debt owed to Petitioner.

The debtors filed a Motion to Avoid Petitioner's lien on the subject property pursuant to 11 U.S.C. §522(f), quoted in Petitioner's brief at pages 2 - 3. The debtors claimed an exemption in the subject property pursuant to Georgia's household goods exemption Official Code of Georgia Ann. §44-13-100(a)(4) quoted in Petitioner's brief at pages 3 - 4.

Petitioner argues that the phrase "debtor's interest" in Official Code of Georgia Ann. §44-13-100(a)(4) means only the debtor's "equity" in the subject property.

The Eleventh Circuit, in In re: Maddox, 713 F. 2d 1526 (11th Cir. Ga 1983), 9 C.B.C. 2d 568, responded

to that interpretation by adopting the language of the District Court decision as follows:

> "If the Court were to adopt the interpretation urged by the appellant 11 U.S.C. §522(f)(2)(A) would be a meaningless provision. The Georgia provision upon which the appellee bases his argument is identical in relevant part to the corresponding federal provision in 11 U.S.C. §522 (d)(3). If the phrase "debtor's interest" in 11 U.S.C. §522(d)(1) means only the debtor's equity, then a debtor could, under the federal scheme, avoid liens on property to the extent the property was free of liens. The result would be equally absurd if the Court were to hold that a lien might be avoided unless the lien were greater than the value of the property. In that case the phrase "debtor's interest" would mean the "debtor's equity" if the debtor had no equity but would mean the "debtor's legal interest" if the debtor had an equity interest in the property."

Judge William L. Norton, author of the treatise Norton on Bankruptcy, in deciding that the phrase "debtor's interest" in the Georgia statute does not mean only the debtor's equity in property, with respect to avoidable liens, stated the following:

> "... First, it seems clear that debtors have an interest even in their fully-encumbered property.

In re: Lovett, 7 B.C.D. 585, 586 (B.C. W.D. MO 1981); see In re: Giles, 9 B.R. 135, 138 (B.C. E.D. TENN 1981). Second, it does not seem likely that the Georgia legislature intended the word "interest" to refer only to the debtors' equity in the property they seek to exempt. The Georgia statute specifically provides exemptions for the purpose of bankruptcy; it identifies and sets monetary limits on categories of exemptible property but does not otherwise affect the lien avoidance nature of §522(f). Giles, supra at 138-9. However, even if the Georgia legislature intended only the equity value to be exempt, "the principle of federal supremacy, applied through the bankruptcy clause of the Constitution, forbids the state from frustrating the intent of Congress [in passing §522(f)] by such an interpretation of state law." In re: Meadows, 9 B.R. 882, 883 (B.C. N.D. GA 1981); see In re: Pine, 11 B.R. 595 (B.C. E.D. TENN 1981); In re: Bubrock, 6 B.C.D. 771, 773 (B.C. W.D. KY 1980); In re: Curry, 5 B.R. 282, 288 (B.C. N.D. OH 1980). A common sense interpretation of §522(f) with the legislative history of that provision indicates that a debtor may avoid a security interest in property that the debtor could exempt if the security interest did not exist. Section 522(f) in effect creates equity if the lien did not exist. In re: Farris, 8 B.R. 186 188 (B.C. E.D. TENN 1981). Section 522(f) is an expression of federal public policy favorable to Title 11 debtors founded on evidence of harmful

> practices of consumer lenders and expressed findings of Congress. Section 522(f) allows the lien to be terminated vis a vis an allowable exemption in that property. It is keyed to the exemption of such property as the exemption would exist in the absence of the consumer lien. The overwhelming majority of courts considering the question have given §522(f) this effect. To hold otherwise would render the provision meaningless and thwart the intention of Congress to remedy a burdensome practice upon unfortunate debtors." In re: Maddox, Adversary No. 80-1042 (June 3, 1983).

The legislative history of 11 U.S.C. §522(f) supports the position that the phrase "debtor's interest ... in household furnishings" does not mean "debtor's equity in household furnishings." Congress expressed its intention as follows:

> "The bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods ... The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's

> experience
> provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment."
>
> * * * *
>
> "The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods."

H. R. Rep. No. 595 Cong. 1st Sess. 127 (1977), reprinted in 1978 U.C. Code Cong. & Ad. News, pp. 5787, 6087 - 8. See also, In re: Hand, 5 B.R. 242, (B.C. S.D. IOWA 1980); In re: Meyers, 2 C.B.C. 2d 470 (B.C. E.D. MICH 1980).

Congress has explained that §522(f) permits the debtor to avoid a nonpossessory, nonpurchase money security interest in household goods and furniture "to the extent that the property could have been exempted in the absence of the lien." H. R. Rep. No. 595, 95th Cong., 1st Sess. 362 (1977), and S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), U.S. Code Cong. & Admin.

News 1978, p. 5787 under subsection (e). Furthermore, Congress stated specifically that "there is a federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start." H. R. Rep. No. 95-(79)-959, 95th Cong. 1st Sess. 126 (1977).

Since the language in the Georgia exemption statute was copied from and is identical to the federal exemption statute (except some of the amounts), it is logical to conclude that the Georgia legislature intended the State exemption statute to mean the same as the federal exemption statute. In view of the broadened definition of property under Bankruptcy Code §541, it appears that the phrase "debtor's interest" was used for the purpose of expanding, and not for the purpose of limiting the debtor's ability to avoid liens.

Furthermore, we question the ability of a State to limit the nonpurchase money exemption to the equity over and above the amount of avoidable liens. It may be that a debtor can claim exemptions only in the equity in the case of non-avoidable, purchase money

liens - but that is not the issue before this Court. Petitioner is trying to confuse the issue by citing authorities relating to non-avoidable, purchase money liens.

The United States District Court of Virginia and other Courts have held that a State may not opt out of the lien avoidance provision of §522(f). In re: Garrido, 11 C.B.C. 2d 506 (B.C. S.D. CAL 1984); In re: Lunsford, 11 C.B.C. 2d 423 (B.C. N.D. OHIO 1984); Eanes v. Shepherd, 33 B.R. 984 (D.C. W.D. VA 1983); In re: Rodgers, 5 B.R. 761 (B.C. W.D. VA 1980); In re: Barto, 8 B.R. 145 (B.C. E.D. VA 1981); In re: Strain, 16 B.R. 797 (B.C. D ID 1982); In re: Meadows, 9 B.R. 882 (B.C. N.D. GA 1981); In re: McKelvey, 20 B.R. 405 (B.C. D AZ 1982); and Curry v. Associates Financial Services, 7 B.C.D. 968 (D.C. N.D. OH).

A State which opts out of the federal exemption scheme must provide debtors with exemptions that are consistent with policies underlying §522. In re: Rhodes, 8 B.C.D. 204 (B.C. M.D. TENN). Under the Supremacy Clause, any State legislation which frus-

trates the full effectiveness of federal law is invalid. U.S.C.A. Consti. art. 6, Cl. 2. In re: Lawson, 11 C.B.C. 2d 358 (B.C. E.D. KY 1984); In re: Hill, 4 B.R. 310 (B.C. N.D. OH 1980). Section 522(f) means that a debtor may avoid a lien of the described type if the debtor could exempt the property if the lien did not exist. States which opt out of the federal exemptions cannot validly change this result by attempting to make only the debtor's "equity" exempt as a matter of State law. In re: Farris, 8 B.R. 186(B.C. E.D. TENN 1981); In re: Fisher, 6 B.R. 206 (B.C. N.D. OH 1980). See, McLaughlin, Lien Avoidance by Debtors in Chapter 13 of the Banrkuptcy Reform Act of 1978, 58 Am. Bankr. L. J. 45 at pp. 61 - 64.

Petitioner relies on the Sixth Circuit decision in Pine vs. Credit Thrift of America, 9 C.B.C. 2d 271 (6th Cir. 1983). That Court held that both Georgia and Tennessee law concerning bankruptcy exemptions were substantially the same, quoting the following Tennessee law:

> "TCA §26-2-112 provides as follows: Exemptions for the purpose of bankruptcy. - personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee, pursuant to §522(b)(1), public law, 95-598 know as the Bankrutpcy Reform Act of 1978, Title 11 U.S.C. §522(b)(1), are not authorized to claim as exempt the property described in the Bankruptcy Reform Act of 1978, 11 U.S.C. §522(d)."
>
> * * * *
>
> "TCA §26-2-102 provides as follows: Personal property to the aggregate value of four thousand dollars (4,000.00) debtor's equity interest shall be exempt from execution, seizure or attachment ... [The Debtor] may select for exemption the items of the owned and possessed personal property ... up to the aggregate value of four thousand dollars (4,000.00) debtor's equity interest."

In Pine, the Court did not explain how it reached the conclusion that Georgia and Tennessee law were identical. The language in the Tennessee statutes is not even slightly similar to the language in the Georgia statutes. The Georgia statute is quoted in Petition-

er's brief at pages 3 - 4 and in its appendix. Furthermore, whether or not it had the right to do so, the Tennessee legislature chose to use the term "debtor's equity interest." This term is significantly different even from the phrase "debtor's equitable interest." For example, a debtor's right to redeem property in which it had no equity has been held to be an "equitable interest" in such property. Pine does not appear to be a well reasoned case. The only authority cited in the entire decision was Matter of McManus, 681 F. 2d 353 (5th Cir. 1982).

The Eleventh Circuit, in Maddox, supra, declined to follow McManus, pointing out that Georgia, unlike Louisiana, has not enacted a specific provision to avoid the effects of subsection §522(f) in addition to opting out of 11 U.S.C. §522(d). In re: Maddox, 9 C.B.C. 2d at 572 - 3. Furthermore, the Eleventh Circuit indicated that even if the Georgia legislature had enacted such a provision, it might have chosen not to follow the McManus case, and to instead follow the dissenting opinion of Judge Dyer, (an Eleventh

Circuit Judge sitting on the McManus panel by designation). The Eleventh Circuit found persuasive Judge Dyer's argument that the federal statute does not permit a State to opt out of the lien avoidance provision of §522(f). See also the cases cited above holding that a State may not opt out of §522(f).

The most thorough evaluation of the issue before this Court appears to be contained in In re: Lawson, 11 C.B.C. 2d 358 (B.C. E.D. KY 1984). After a review of legislative history, the Court in Lawson concluded that the provisions of §522 should not be restricted to mean only the debtor's legal interest in property, but should also be construed as encompassing a debtor's "equitable" interest in property. That Court stated at page 362 - 363:

> "Section 522(e) of the Bankruptcy Code, 11 U.S.C. §522(e), provides '[a] waiver by the debtor of a power under subsection (f) ... of this section to avoid a transfer ... is unenforceable in a case under this title.' Section 522(e) makes no distinction between a contractual and a statutory waiver of such power by a debtor. In this instance the Kentucky statute does not become operative until a security agreement

is voluntarily executed by the debtor, whereupon the statute becomes part of the agreement and results in an unenforceable waiver.

The effect of section 522(e) of the Bankruptcy Code was not addressed by the Sixth Circuit in In re: Pine, 717 F. 2d 881 [9C.B.C. 2d 271] (6th Cir. 1983). Consequently, the decision in that case is not controlling in this case. Nevertheless some comment on that case seems appropriate.

In Pine the Court reasoned that the lien avoidance provisions of section 522(f) are applicable only with respect to the debtor's "interest" or "equity interest" in property on the date of bankruptcy and consequently are unavailable when a state statute denies the debtor an exemption in encumbered property. This reasoning overlooks the fact that section 522(d)(3) of the Bankruptcy Code, 11 U.S.C. §522(d)(3), provides an exemption only for the debtor's "interest" in household furnishings, household goods, etc. The rationale adopted by the Sixth Circuit in Pine would render the lien avoidance provisions of section 522(f) meaningless even if those few states where the exemptions provided for by section 522(d) remain available to debtors.

This rather obvious fact was recognized by the Eleventh Circuit Court of Appeals in In re: Maddox, 713 F. 2d 1526 [9 C.B.C. 2d 568] (11th Cir. September 9, 1983), decided two days after the decision of the Sixth Circuit in the Pine case. The Court in the Maddox case, in construing the identical Georgia

statute involved in the Pine case, upheld the rights of a debtor claiming exemptions under Georgia law to avoid a nonpossessory, nonpurchase-money lien on household goods. The Court in Maddox characterized as absurd the rationale adopted by the Sixth Circuit that sections 522(b)(2)(A) and 522(f) of the Bankruptcy Code in combination permit a debtor to avoid a nonpossessory, non-purchase-money lien on exempt property only to the extent the property in question is free of such a lien. The Sixth Circuit arrived at the foregoing result in Pine by concluding that the word "property" as used in section 522(b)(2)(A) of the Bankruptcy Code does not mean property in the layman's sense but rather denotes only legal interests in property because 'the Act throughout characterizes property in terms of various security and other interests.' With due respect to the Sixth Circuit, the statement in the quoted language is simply contrary to fact.

Section 541 of the Bankruptcy Code defines property of the estate to include 'all legal or equitable interests of the debtor in property as of the commencement of the case.' 11 U.S.C. §541. Section 522(b) of the Code begins with a cross reference to section 541 and provides as follows:

> §522 Exemptions
> "(a)...
> "(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either-
> "(1) property that is specified under subsection (d) of this section, unless the State law

> that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative, (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; ..."
>
> 11 U.S.C. §522.
> We have emphasized the word "property" each time it appears in this section. Obviously, the first time it appears it is used in the same sense as it is used in section 541 and includes equitable as well as legal interests of the debtor in property. Apparently, the Court in Pine would concede that the word "property" as used in section 522(b)(1) encompasses equitable interests of the debtor; otherwise, as previously noted, the lien avoidance provisions of section 522(f) of the Code would be unavailable to debtors even in those states that have not enacted opt-out legislation. Why the word "property" as used in section 522(b)(2)(A) should be interpreted to exclude the debtor's equitable interest in property is a mystery."

The Lawson Court also noted the following at pages 368 - 371:

"[2] There is not even the slightest hint in legislative history of an intention on the part of Congress to permit States to undercut the lien avoidance provisions of section 522(f) of the Bankruptcy Code in conjunction with opt-out legislation restricting debtors seeking relief in bankruptcy to exemptions provided by State law. The Senate bill, which restricted debtors to the exemptions provided by State law, contained the exact lien avoidance provision that appears in present law. The language of the House and Senate reports explaining this provision is substantially identical. Both reports say "property may be exempted even if it is subject to a lien. ..." and that the debtor may avoid a nonpurchase-money lien on certain household goods that could have been exempted in the absence of the lien. Unlike the Court in the Pine case, this Court is unable to find any inconsistency whatsoever between the legislative history and the plain language of sections 522(b)(2)(A) and 522(f) of the Bankruptcy Code."

* * * *

"Actually, as is quite evident when one delves into the matter, Congress viewed the taking of a nonpossessory, nonpurchase-money security interest in household goods, tools of the trade and health aids as an unfair credit practice that should be discouraged. Consequently, it is unlikely Congress intended to permit the States to override Federal policy and encourage a practice that Congress intended to restrict. The following history is relevant."

* * * *

"...the National Commission on Consumer Finance recommended that a creditor not be allowed to take other than a purchase money security interest in household goods. Consumer Credit in the United States, Report of the National Commission on Consumer Finance (December 1972) at xvi. It was the view of the Commission that in the event of default a nonpurchase-money security interest in household goods and the accompanying right to repossess or threat to repossess such goods has far too disruptive an impact on the family life of the debtor to be in the public interest. Id. at 27. This recommendation of the National Commission on Consumer Finance was adopted and codified by the Commission on Bankruptcy Laws of the United States in its subsequent report to Congress in 1973. Report of the Commission on Bankruptcy Laws of the United States, July 1973, Part I, at 169-170, and Part II, at 126-30. The Bankruptcy Commission recommended that a waiver of exemptions be unenforceable by a creditor that does not have security in the property, that judicial liens not be enforceable against exempt property, and that nonpurchase-money security interest be unenforceable as to wearing apparel, household goods, and health aids. Id. The applicalbe provisions of the Bankruptcy Commission Bill invalidating such liens on protected exempt property were self-executing in that such liens were rendered unenforceable as a matter of law. Id., Part II, at 126, 130; H.R. 10792, 93rd Cong., 1st Sess. §4-503(f). However, the final version of the Bankruptcy Code as enacted

by Congress requires affirmative action by an individual debtor pursuant to section 522(f) of the Bankruptcy Code to avoid liens on selected categories of exempt property."

* * * *

"The Uniform Exemptions Act, drafted by the National Conference of Commissioners on Uniform State Laws, approved in 1976 and recommended for enactment in all states, would preclude enforcement of a nonpossessory, nonpurchase-money security interest in furnishings and appliances reasonably necessary for one household, as well as certain other property. See section 11, Uniform Exemptions Act. The comment to section 11 states that restrictions on enforceability of nonpurchase-money security interests in household goods were recommended by the National Commission on Consumer Finance, as previously discussed in this memorandum. The comment also cites FTC's proposed Trade Regulation Rules on Credit Practices §444.2(a)[1] and FRB's proposed Rules on Uniform Credit Practices §228.2(a)(4)[2]. These proposed regulations of the Federal Trade Commission and Federal Reserve Board were based on the conclusion that the taking of a nonpossessory, nonpurchase money security interest in household goods should be defined as an unfair trade practice.

The Report of the Presiding Officer following hearings by the Federal Trade Commission on its proposed regulation states:

> "The real purpose of taking a security in such property is simply to obtain a device to terrorize consumers or to harass

> them until payments are made on the loans. Even if such goods are repossessed, the costs of pick-up, storage, and sale would probably exceed the amount of the proceeds."
>
> It should be noted that on March 1, 1984 the Federal Trade Commission issued a final rule defining the taking of " a nonpossessory security interest in household goods other than a purchase money security interest" to be an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act. This regulation becomes effective March 1, 1985. See 49 Fed. Reg. 7740, at 7761-68; 7789-90 (March 1, 1984) (to be codified at 16C.F.R. Part 444).
> Thus a practice which Congress intended to discourage by adoption of section 522(f) of the Bankruptcy Code will become a prohibited practice on March 1, 1985.
> The suggestion that Congress has permitted the several States to override Federal policy in this matter must be rejected."

Petitioner cites U.S. vs. Security Industrial Bank, 49 U.S. 70, 103 S. Ct. 407 (1982). This case deals only with the constitutionality of applying 11 U.S.C. 522(f) retroactively. It is not relevant in the instant case.

In Matter of Sullivan, 680 F. 2d 1131 (7th Cir. 1982), also cited by Petitioner, the Court held that a state statute providing for $300.00 in the homestead and related wild card exemptions did not conflict with

federal law which allowed the debtor to claim $7,900.00 in the same exemptions. Upon examining legislative history, that Court found that it was the intent of the House to give the debtors a "fresh start" but the Court could find no such intent on the part of the Senate (680 F. 2d at 1135-36). Since the intent of the House could not be treated as the intent of Congress, the Sullivan Court declined to follow Cheeseman v. Nachman, 656 F. 2d 60 (4th Cir. 1981).

The Fourth Circuit in Cheeseman found that the intent of Congress as to 11 U.S.C. §522(b)(1) and (2) was not to permit states to eliminate federal exemptions entirely, but to permit similar state exemptions in lieu of the federal exemptions. The state law in that case allowed only one spouse to claim a homestead exemption, whereas federal law allows both spouses to claim said exemption. Noting that the "...state exemptions were retained so that exemption levels could be set at a level commensurate with the standard of living in the various parts of the country" (p. 64), the Court held that the foregoing state law conflicted with federal

law. The Fourth Circuit, the Eleventh Circuit and the numerous cases cited above are correct. Section 522 (b)(1) and (2) authorize states to take away the debtor's right to elect the federal exemptions only to the extent that they provide alternative exemptions consistent with federal law.

Nor is Wallis v. Clark, Superior Court of Dekalb County, 166 Ga. App. 775 (1983), relevant to the issues in this case. That case dealt with the homestead exemption under O.C.G.A. §44-13-100(a)(1). In the instant case, the exemption claimed is the distinct and separate household goods and furniture exemption under O.C.G.A. §44-13-100(a)(4). Furthermore, Wallis dealt with a nonavoidable lien, i.e., the first mortgage on the debtor's residence, a purchase money security interest. Wallis sued the County Clerk for failing to record a deed, claiming that said failure caused him to lose his bankruptcy homestead exemption. Apparently because the house had been vacated and was vandalized, the Trustee was unable to sell the house for more than the amount due on the mortgage. The

Trustee therefore abandoned the house to the mortgage holder. The Court of Appeals held that the debtor lost his claimed homestead exemption, not because of the Clerk's error, but because there was no value left after the nonavoidable purchase money debt had been paid off. In the instant case, there is no purchase money security interest on the subject property.

Therefore, the authorities relied on by Petitioner provide no basis for this Court to overrule the Eleventh Circuit decision in this case.

CONCLUSION

Respondents request this Court to sustain the decision of the Eleventh Circuit and to hold that the term debtor's "interest" under O.C.G.A. §44-13-100(a)(4) is not restricted to the debtor's "equity" in property with respect to avoidable liens based on nonpossessory, nonpurchase money secuirty interests in household goods and furniture. Respondents further request that this Court hold that a State may not eliminate such exemption in its entirety and that any State law which purports to do so is void as a violation of the Supremacy Clause of the United States Constitution. In the alternative, Respondents request that certiorari be denied.

Respectfully submitted,

PAUL C. PARKER & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and exact copy of the foregoind Brief to:

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by placing same in a properly addressed envelope with sufficient postage affixed thereto and depositing same in the United States Mail.

This 26 day of March, 1985.

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